be conducive to self-restraint to lay greater emphasis upon the fact that bankruptcy *per se* gives to the tenant, in this connection, no new immunities whatsoever.

RESTRICTIVE INTERPRETATION. — Genuine interpretation seeks to determine what the words of a statute provide as to a particular situation.[1] But when it is clear what the words of the statute provide, is it ever permissible by interpretation to depart from those words on the ground that, had the legislature adverted to the particular situation at issue, it would not have desired the statute to be applicable to it?

Some decisions under a New York statute are of interest in this connection. The statute makes it a misdemeanor to use without consent a person's name or picture "for advertising purposes or for the purposes of trade." [2] It seems clear that the legislature would not have desired the statute to be applied to the publication of news,[3] yet its wording clearly includes such publication.[4] However, when persons sued whose pictures had been published in a newspaper,[5] or in a magazine,[6] they were denied recovery. And in the recent case of *Humiston* v. *Universal Film Mfg. Co.*,[7] a person whose picture had been published in a weekly news film of current events was likewise denied recovery.

What in reality is the process by which such a result may be reached? Courts almost invariably justify any such departure from the language of the statute as an application of the true legislative intent [8] which supposedly had been inaptly expressed by the "literal" [9] words of the act. Surely in many cases this talk is inaccurate. In the cases above, for example, even assuming that the legislature, had it considered the matter, would not have desired the statute to be applied to the publication of news, it does not follow that the legislature intended that it should not be so applied. Had it so intended it would doubtless have expressed that intention in the form of a qualification rather than have

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[1] This becomes necessary when the words are ambiguous, or when there is a choice between conflicting provisions. See Roscoe Pound, "Spurious Interpretation," 7 COL. L. REV. 379, 381.

[2] See CIVIL RIGHTS LAW (CONSOL. LAWS, c. 6), §§ 50, 51.

[3] To do so would make it illegal for a paper even to mention a person's name without consent.

The Act was apparently passed to rectify the law as found in the Robertson case, where a woman whose picture had been extensively used in the advertisement of a certain commodity was denied recovery. Robertson *v.* Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

[4] Surely a paper does not publish people's pictures as a compliment to them, but for the purposes of its trade, the dissemination of news.

[5] Jeffries *v.* New York Evening Journal Publishing Co., 67 Misc. 570, 124 N. Y. Supp. 780 (1910).

[6] Coyler *v.* Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N. Y. Supp. 999 (1914).

[7] 178 N. Y. Supp. 752 (1919). See RECENT CASES, p. 735, *infra*.

[8] See *In re* Howard's Estate, 80 Vt. 489, 68 Atl. 513 (1908); Curry *v.* Lehman, 55 Fla. 847, 47 So. 18 (1908).

[9] When the words of the statute are inconvenient they are frequently referred to in a derogatory manner as the "literal" words of the statute, as though the use of that adjective justified any liberties which might be taken with them by way of interpretation.

allowed the statute to go forth too broadly worded, a breeder of future trouble.[10] The most that can be said is that the court seeks to apply the intent which in its opinion the legislature would have had, had it considered that situation. Austin speaks more accurately of applying the "reason of the statute."[11] This he calls spurious interpretation.[12] When the words of the statute include cases which its reason would not, the application of the reason he calls restrictive interpretation.[13] The decisions in the New York cases mentioned above seem to have been reached in that way.

This sort of interpretation has certain peculiarities. Normally, in the case of genuine interpretation, the court assumes that the words used by the legislature express the "reason of the statute."[14] To be sure if the words are ambiguous the court may itself determine otherwise the "reason of the statute," but only as a guide to show which is the correct sense of the words. It gives effect to its independent determination only so far as the words will allow; it is truly construing *words*. Here it gives effect to such determination further than the words will allow — even though the words cannot without qualification bring about any such result; it is no longer merely construing words, but might be said to construe the "reason of the statute." To do so is in effect to amend the words; where the legislature has failed to use apt words, the court steps in. Dean Pound has likened this to the compensations in the human system when some member fails to function properly.[15] The line between interpretation and judicial legislation here becomes shady. So far as the words go, this looks like the latter, but inasmuch as the court attempts to apply the "reason of the statute," it may well be called one form of interpretation. Its peculiarities should, however, be recognized.

To admit such a rule is to enter upon a dangerous ground.[16] Once the jurisdiction to apply some other standard than that indicated by the words of the statute is admitted, then in a doubtful case it becomes open to question whether the law as written is really applicable. The court's discretion is in some measure substituted for the written law. There is the danger of abuse.[17] Ground is furnished for the belief that

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[10] See GRAY, THE NATURE AND SOURCES OF THE LAW, § 370.

[11] See AUSTIN, JURISPRUDENCE, 3 ed., 1025.

What is commonly laid down as the law seems contradictory. It is said that the court should apply the clear meaning of the language, but if it seems that the legislative intent requires a result which the words of the statute would not bring about, then the former should prevail.

[12] See AUSTIN, JURISPRUDENCE, 3 ed., 1028. See Roscoe Pound, "Spurious Interpretation," *supra*.

[13] See AUSTIN, JURISPRUDENCE, 3 ed., 1025.

[14] See Curry *v.* Lehman, *supra*.

[15] See Roscoe Pound, "Spurious Interpretation," *supra*, p. 384.

[16] *Ibid.*

[17] See Scott, "The Progress of the Law, 1918–1919 — Civil Procedure," 33 HARV. L. REV. 236, 240, and cases cited, showing how certain courts refused to give full effect to the code provisions abolishing the distinctions between forms of action, but continued to hold persons bringing suit to the "theory of their complaint."

See also WILLISTON, SALES, § 407, and cases cited, showing how courts refused to give complete effect to statutes providing that bills of lading should be negotiable "in the same manner as bills of exchange."

the courts make and unmake the law at will. This leads to the desire for political control of the courts and the demand for an elective judiciary.

Whether this jurisdiction should nevertheless be entered upon involves a large problem of jurisprudence — that arising out of the conflicting desires for certainty in the law, and for due regard for the equities of individual cases.[18] Suffice it here to say that under prevailing methods of drawing statutes this sort of interpretation seems at times necessary to avoid absurd and untimely results from ill-framed legislation.

COMPENSATION FOR PROPERTY TAKEN FOR THE DEFENSE OF THE REALM. — The recent English case of *De Keyser's Hotel* v. *The King*,[1] in which compensation was allowed for a hotel taken during the war for war purposes, seems quite irreconcilable with the earlier decision, *In Re a Petition of Right*,[2] in which no compensation was allowed as a matter of right to the owner of an aerodrome also taken by military authorities for war purposes. The attempted distinctions fall under three heads: administrative purposes are distinguished from use in actual hostilities; taking *in invitum* is distinguished from taking pending negotiations; and finally, the Crown did not insist in the Hotel case on the consideration of the prerogative separately from the statutes. Of the first two contentions it is enough to say that they do not square with the facts. There was no contention in the first case that the aerodrome was wanted for actual hostilities. Besides, there was no pretense of going behind the decision of the proper administrative officers on the question of the necessity of the taking in either case. As to the contention that the negotiations for the transfer of the hotel under a lease make it impossible to consider the taking without a lease *in invitum*, it need only be stated in this naked form to be refuted. One wonders whether a desire on the part of the owner of the aerodrome to haggle with the government would not have saved his case as well.

The only distinction that remains is suggested by Warrington, L. J., who sat in both cases: the admission of the Crown in the second case that the prerogative was merged in the statutes. This seems a tremendously significant limitation of the prerogative, and one wonders why the Crown after its success in the aerodrome case yielded so much. Perhaps it was on the basis of a doubt on this point that the aerodrome case was compromised while pending in the House of Lords. Perhaps it was good policy not to risk a reversal on so valuable a point, *flagrante bello*. But a more important innovation in this argument was the suggestion that the Statute of 1842 was to be read in connection with the legislation of 1914. The older statute had fixed the right of compensation. The latter simplified procedure by enabling the administrative to do away with certain restrictions. They had done away with one restriction involving a two weeks' delay in taking possession and another involving the invasion of the kingdom as a condition precedent.

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[18] See Roscoe Pound, "The Enforcement of Law," 20 GREEN BAG, 401.

[1] [1919] 2 Ch. 197.
[2] [1915] 3 K. B. 649.